No. 13640

United States Court of Appeals

for the Ninth Circuit.

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellant.

vs.

HORTON CAPOEMAN and EMMA CAPOEMAN, his wife,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-30-53

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 134

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

vs.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 8, 1955
CERTIORARI GRANTED OCTOBER 10, 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Deductions

18. Income Tax net income (Item 10, Col. 1, less Item 17, Col. 1) $2,859.32

Income and Victory Tax

20. Unpaid balance of 1943 Income and Victory Tax (from line 22, page 4) $298.11

22. Amount paid with this return (item 20 less item 21) $298.11

23. Refund or Credit:

If the total of your payments (line 21 (d) on page 4) is larger than your tax (line 20 on page 4), enter the difference 6% interest from 3/15/44 to 10/15/47 ..... $ 64.09

Indicate by a check mark (√) what you want done with this overpayment: Refund it to me [ ]; Apply it on my 1944 estimated tax [ ] $362.20

I declare under the penalties of perjury, that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return. (Date) Oct. 10/47.

Schedule I.—Personal Exemption and Credit for Dependents.
(See Tax Computation Instructions)

(1) Personal Exemption

Status: Single, or married and not living with husband or wife, and not head of family; 12 months; credit claimed $1,200.00.

(2) Credit for Dependents

Name of dependent and relationship: Wife; 18 years or over, 12 months; credit claimed $600.00.

Schedule J.—Computation of Earned Income Credit.
(See Tax Computation Instructions)

(1) If your net income is $3,000 or Less, use only this part of schedule

Net income (item 18, page 1) $2,859.32

Earned income credit (10% of net income, above) 285.93

Question's

1. Did you file a return for any prior year? no.
3. If separate return was made for the current year, state: no.
4. Check whether this return was prepared on the cash [X] or accrual [ ] basis.
5. Was the rate of your salary or wages increased or decreased during your taxable year? (Yes or No) No.

NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS,
United States Attorney,

GUY A. B. DOVELL,
Assistant United States Attorney,
324 Federal Bldg.,
Tacoma (2), Wash.

THOMAS R. WINTER,
Attorney, Bureau of Int. Revenue,
Smith Tower Bldg.,
Seattle, Wash.
For Squire.

KENNETH R. L. SIMMONS,
221 Fratt Bldg.,
Billings, Montana.
For Taxpayer.

7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation, or a personal holding company as defined by section 501 of the Internal Revenue Code? No.

Computation of Income and Victory Tax. Page 4
(See Tax Computation Instructions)

1.	Income tax net income (Item 18, P. 1)		$2,859.32
3.	Less: Credit for dependents (From Schedule I-(2)		$2,859.32
4.	Balance (surtax net income)	$1,200.00	
5.	Less: Certain interest on Government obligations (item 4 (a), page 1)		$1,200.00
6.	Earned income credit. (From Schedule J-(1) or J-(2))		1,659.32
8.	Normal tax (6% of line 7)	285.93	$ 285.93
9.	Surtax on amount in line 4. (See Surtax Table, page 3 of Instructions)		1,373.39
10.	Total Income Tax (line 8 plus line 9). (If Schedule B is used and alternative tax computation made, enter line 16, Schedule B)		$. 82.40
11.	Less: Income Tax paid to a foreign country or U.S. possession. (Attach Form 1116)		215.71
12.	Balance of Income Tax		$ 298.11
14.	Total of lines 12 and 13		$ 298.11
16.	Line 14 less line 15		$ 298.11
18.	Enter line 16 or 17 whichever is Larger. (Members of the armed forces see page 4 of Instructions)		$ 298.11
19.	Forgiveness Feature (Don't fill in (a), (b), and (c) below, if either line 16 or 17 is $50 or less): (a) Enter line 16 or 17, whichever is Smaller		298.11
21.	Less: (b) Income Tax paid on 1942 income		$ 298.11

Footnote 1.—If you claim a credit in line 15, disregard lines 19(a) and (b), complete Schedule L-1 on page 4 of Instructions, and enter result in line 19(c). Attach completed schedule. $298.11

Schedule D. (Form 1040)—U.S. Treasury Dept., Int. Revenue Service.

Schedule of Gains and Losses From Sales or Exchanges of (1) Capital Assets and (2) Property Other Than Capital Assets
(To Be Filed With the Collector of Internal Revenue With Form 1040)
For Calendar Year 1943

Name of taxpayer, Horton Capoeman.
Address, Tahola, Wash.

Long-Term Capital Gains and Losses—Assets Held For More Than 6 Months

1. Kind of property, Timber.
2. Date acquired, 10/1.
3. Date sold, 1943.
4. Gross sales price (contract price) $8,418.28
5. Cost or other basis, $2,026.80.
6. Expense of sale and cost of improvements subsequent to acquisition or Mar. 1, 1913 ..... $ 673.46
8. Gain or loss, $5,718.64. Gain or loss to be taken into account:
9. Percentage, 50.
10. Amount, $2,859.32.

Total net long-term capital gain or loss (enter in linet 2, column 3, of summary below) $2,859.32

Summary of Capital Gains and Losses

1. Classification, Total net short-term capital gain *$5,718.64

*Column 5. Total net gain taken into account in columns 2, 3, and 4 of this summary.

Tahola, Wash.
Sept. 10, 1947.

Collector of Internal Revenue,
Tacoma, Wash.

Explanation of Delinquency
Determination of Tax Liability

Reference is made to the attached Income Tax return filed for myself for the calendar year 1943.

We plead that no Ad Valorem penalty be imposed for the reason that the delinquency is due to the awaiting of the Circuit Court's decision in the Scott vs. Commissioner case, which was being liti-

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1101

HORTON CAPOEMAN and EMMA CAPOEMAN, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Defendants.

COMPLAINT

Come now plaintiffs and for cause of action against defendants allege:

I.

That plaintiffs are and during the times herein mentioned were husband and wife and are full-blood Quinaielt Indians born on the Quinaielt Indian Reservation within the United States, and at all times were and are duly enrolled and recognized members of the Quinaielt Indian Tribe of the Quinaielt Indian Reservation and are citizens of the United States and residents of the State of Washington, and plaintiffs have resided on said Quinaielt Indian Reservation in the State of Washington continuously since birth, and at all times have affiliated with said Quinaielt Tribe of Indians

gated to determine the taxability on the sale of timber by members of the Quineault Tribe of the State of Washington, which was recently handed down in favor of the government, and since the United States received and held the funds arising from the sale of said timber, as Trustee, and had control of the disbursal of the same, the duty devolved on it, so acting in such fiduciary capacity, to file said return.

Determination of Tax Liability

The timber sold giving rise to the income referred to herein was on lands within the Quineault Indian Reservation allotted to taxpayers, full blood, Indians, members of the Quineault Tribe, and in this instance the sale was conducted by the Department of the Interior, of the United States, Bureau of Indian Affairs, acting through the Local Indian Agent, having jurisdiction of said Quineault Indian Reservation, who received the money and after making certain deductions therefrom to defray administration expenses, credited the balance of the proceeds to taxpayers account, but some was held in trust by the United States.

The contract of sale provides for payment of timber as it was cut. Out of a total of $15,080.80 finally realized from sale of all the timber on the allotment, only $8,418.28 in value was cut and paid for in 1943. This amount is therefore being reported for the year as sold, since the balance was paid in subsequent years as the timber was cut.

Of said sum of $8,418.28 so paid on account of said sale of timber, $1,537.00 thereof was disbursed

and are, and at all times herein mentioned were under the jurisdiction, supervision and control of the defendant United States acting by and through the Superintendent of the Taholah Indian Agency at Hoquiam, Gray's Harbor County, Washington, and are and at all times mentioned in this complaint were classified as non-competent Indians and wards of the Government of the United States.

II.

That defendant Clark Squire is and at times herein mentioned was Collector of Internal Revenue of the United States for the Collection District of Washington, residing at Tacoma, Pierce County, Washington, within the above entitled District.

III.

That this action is one under the Revenue Act of 1921 of the United States for the recovery of income taxes erroneously and illegally assessed against and collected from plaintiffs in violation of certain treaties entered into between the United States of America and certain Indian Tribes and in violation of the laws of the United States.

IV.

That on July 1, 1855, and January 25, 1856, Articles of Agreement and Convention were made and concluded by and between the United States of America acting through its duly authorized representatives and the Quinaielt and other bands or tribes of Indians acting through their chiefs and delegates, whereby the members of said Indian

Tribes ceded, relinquished and conveyed to the United States their respective rights, title and interest in and to certain lands and country then occupied by them described in said Articles of Agreement and Convention of July 1, 1855 (12 Stat. 971), which said Treaty is a public document embraced in an Act of Congress and is hereby referred to and made a part hereof by reference. That said Treaty was ratified by the United States on March 8, 1859 and duly proclaimed on April 15, 1859, by the terms of which said Treaty there was secured to members of the Quinaielt Tribe Band of Indians, their posterity and successors, a reservation of lands sufficient for their needs, which said Reservation was later designated by the United States and thereafter surveyed and set apart for the exclusive use of the members of said Quinaielt Tribe of Indians, their posterity and successors in interest, and that said Indian Reservation so set aside has been the home and abiding place of the members of the Quinaielt Tribe of Indians, including plaintiffs. That plaintiffs are the posterity of and successors in interest of the members of said Quinaielt Tribe of Indians who participated in the making of said Treaty.

V.

That in pursuance of said treaties and laws of Congress enacted in pursuance thereof, there was allotted to plaintiffs the following described real property within Quinaielt Indian Reservation, Grays Harbor County, Washington, to wit:

Lot four of Section twenty-five and the southwest quarter of the southwest quarter of Section twenty-four in Township twenty-two north of Range twelve west of the Willamette Meridian, Washington, containing ninety-three and twenty-five-hundredths acres;

and that a trust patent therefor was duly issued to plaintiff Horton Capoeman on the 1st day of October, 1907, a copy of which said trust patent is hereto attached marked Exhibit "A" and made a part of this complaint by reference.

VI.

That according to the terms of said treaties and laws of Congress enacted in pursuance thereof, the lands embraced within said description above set forth, together with the standing timber thereon, consisting of coniferous-bearing trees from one hundred to several hundred years of age, is, and at all times in this complaint mentioned, was trust property under the sole supervision and control of the United States, and neither said land nor the timber growing thereon, which was and is a part of said real estate was or is subject to alienation by plaintiffs without the consent and approval first had of the United States.

VII.

That during the year 1943 a sale of a portion of plaintiff's allotment, consisting of certain timber growing and standing thereon was conducted by the Department of the Interior of the United States,

Bureau of Indian Affairs, acting through the local Indian Agency of the United States having jurisdiction of said Quinaielt Indian Reservation; that a contract of sale by said Agency was entered into providing for payment of timber as it was cut; that out of a total of $15,080.80 to be finally realized from the sale of said timber from said allotment but $8,418.28 was paid during said year, and the balance of said agreed purchase price was paid during subsequent years; that of said sum of $8,418.28 so paid on account of said sale of timber, $1,537.00 thereof was disbursed to plaintiffs during the year 1943, and the balance of said sum, to wit, $6,878.00 was held in trust and maintained in an account to the credit of the United States, subject only to withdrawal by plaintiffs by and with the consent of said United States Indian Agency and the Department of Interior officials of the United States.

VIII.

That plaintiffs' only entire income during the calendar year 1943, other than certain monies paid to plaintiffs Horton Capoeman as a member of the Armed Forces of the United States, consisted of the proceeds from the sale of said timber, being a portion of plaintiffs' trust allotment above described; that all of said monies were and are a part of an instrumentality of the government of the United States to effect a governmental purpose and means aimed to bring plaintiffs finally to a state of competency and independence.

IX.

That plaintiffs' status and condition at present and at all times in this complaint mentioned were such that it was necessary and proper, and is now necessary and proper, that the same be used and employed, without deduction, to the proper maintenance and support of plaintiffs.

X.

That said Articles of Agreement or Treaty of July 1, 1855 provides in substance (Article II) that no white man shall be permitted to reside on said Quinaielt Indian Reservation without permission of the Tribe and of the Superintendent of Indian Affairs and Indian Agent, and plaintiffs state the fact to be that in case Federal income taxes are imposed on plaintiffs and on other members of the Quinaielt and Quileute Tribes of Indians similarly situated on account of the income from the sale of trust property, or any part thereof, that it will ultimately result in the distrainf and impounding of said trust property and in the sale of said allotments and lands within said Indian Reservation to white men in violation of the contract rights of plaintiffs under said trust patent Exhibit "A," and in violation of the rights vouchsafed and secured to plaintiffs and the other members of said Indian Tribes similarly situated under said Treaties of July 1, 1855 and January 25, 1856, and in violation of their rights under Amendments V and XIV of the Constitution of the United States.

XI.

That at the times of the making of said Treaties of July 1, 1855 and January 25, 1856 and at the time of the issuance of said Patent, Exhibit "A," on October 1, 1907, plaintiffs and their ancestors, all of whom were Tribal Indians, members of the Quinaielt Indian Tribe, were by law exempt from taxation, and their Reservations, estate, and allotments were held in trust by the United States and were at all times and are now exempt from levy, distraint, or sale for taxes, and at all times were and are exempt from attachment, garnishment, or sale under execution, all of which was known to the respective parties to said Treaties and to the parties to said Patent, Exhibit "A," and said Treaties were made and said Patent, Exhibit "A," was issued subject to and in reliance on said conditions.

XII.

That the trust created by said conditional Patent, Exhibit "A" and, all and singularly, the provisions and conditions thereof were prior to October 1, 1932 extended for an indefinite period. That said trust is still in full force and effect.

XIII.

That the lands hereinabove described were, and parts thereof are still, heavily timbered; that the principal value thereof was in the timber growing thereon; that the cost of reducing said lands to an arable condition fit for grazing or crop production is prohibitive.

XIV.

That in compliance with the demands of defendant Clark Squire as such Collector of Internal Revenue, plaintiffs filed an income tax return for the year 1943, a copy of which said income tax return is marked Exhibit "B" and made a part of this complaint by reference, in pursuance of which said income tax return said defendant Clark Squire as such Collector wrongfully collected and received from plaintiffs on October 10, 1947, the sum of $298.11 and $64.09 accrued interest, as set forth in said return, Exhibit "B."

XV.

That subsequent to the payment by plaintiffs of said income tax so wrongfully exacted and received from plaintiffs by said defendant Clark Squire as such Collector, plaintiffs on January 12th, 1948, filed a claim for refund with said Clark Squire as such Collector of Internal Revenue, a copy of which said claim for refund of said payment is attached hereto marked Exhibit "C" and made a part of this complaint by reference.

XVI.

That on January 21, 1948, defendants denied said claim for refund by denial in writing, a copy of which said denial is marked Exhibit "D" and made a part hereof by reference.

XVII.

That in arriving at said tax so assessed against plaintiffs and receiving payment thereof, and in

consisted of the proceeds from the sale of said timber, being a portion of claimants' trust allotment above described; that all of said monies was part of an instrumentality of the government of the United States to effect a governmental purpose and means aimed to bring claimants finally to a state of competency and independence. That claimants' status and condition at present and at all times in this claim mentioned were such that it was necessary and proper, and is now necessary and proper, that the same be used and employed, without deduction, to the proper maintenance and support of claimants.

That said Articles of Agreement or Treaty of July 1, 1855, provides in substance (Article II) that no white man shall be permitted to reside on said Quinaielt Indian Reservation without permission of the Tribe and of the Superintendent of Indian Affairs and Indian Agent, and claimants state the fact to be that in case a Federal Income tax is imposed on claimants and other members of said tribe similarly situated, that it will ultimately result in the sale of claimants' right and interest to said allotment and the like rights and interest of other members of said Quinaielt Tribe of Indians similarly situated, to white men, in violation of the terms and provisions of said Treaty, and in violation of the terms of said Patent (Exhibit A) attached hereto. That the imposition of a Federal Income Tax by the United States on the proceeds of a sale of said timber, which is a part and parcel of claimants' allotment, is not authorized by the

refusing to allow said claim of refund, defendants erroneously and wrongfully concluded and determined that the income of plaintiffs for the year 1943 arising from the sale of part of their said allotment, as hereinbefore alleged, was subject to the payment of Federal income taxes.

XVIII.

That there is now due and owing plaintiffs by Defendants the sum of $362.20, with interest thereon at the legal rate from October 10, 1947.

XIX.

In the alternative and in the event that the court should hold that said income of plaintiffs is subject to imposition of income taxes, then plaintiffs allege that defendants are now estopped from collecting interest or penalties thereon for the reason that the United States of America held and controlled said income in a Fiduciary capacity and any duty to make an income tax return and pay said tax devolves upon the United States as such Fiduciary.

XX.

That for a period of years prior to the year 1943 the Commissioner of Internal Revenue of the United States and his predecessors in office in many official and non-official opinions, to which plaintiffs as well as defendants had access, ruled that income of the nature described herein received by Tribal Indians was not subject to imposition of income taxes under the laws of the United States, which

Income Tax laws or various revenue laws or acts of the United States, and is contrary to the letter and spirit of said treaties, and is contrary to the understanding and intention of the members of said Quinaielt Tribe of Indians and their Chiefs, headmen and delegates who entered into said Articles of Agreement and treaties hereinabove referred to, and that under the Constitution and laws of the United States said proceeds of sale of said timber are exempt from the payment of income taxes.

That the trust created by said conditional patent exhibit "A" and all and singular the conditions thereof was prior to October 1st, 1932, extended by the United States for an indefinite period and the same is still in full force and effect.

EXHIBIT "D"

Treasury Department
Internal Revenue Service
Tacoma 2, Wash.

January 21, 1948.

In replying refer to
IT:OGI:se
10-200153-47
Mr. Horton Capoeman,
c/o F. L. Hohensinner,
525 Perkins Building,
Tacoma, Washington.

Dear Mr. Capoeman:

Reference is made to your claim for refund of 1943 income tax in the amount of $298.11 which was

official and non-official opinions were communicated to plaintiff and to the various Indian Agents appointed by the office of Indian Affairs to supervise the affairs of the Indian Tribes, including the Quinaielt Tribe, who advised them regarding their non-liability for the payment of income taxes. That previous to the date of the demand for payment of income taxes hereinbefore referred to, neither plaintiffs nor other members of the Quinaielt Tribe of Indians, were advised that the Commissioner of Internal Revenue had reversed his position with respect to the payment of income taxes by Tribal Indians, or that the members of said Tribe would be required to file income tax returns and pay Federal income taxes under the laws of the United States. That in equity and fair dealing Defendants should now be estopped from collecting interest or penalties on account of the non-payment of said Federal income taxes.

XXI.

That no assignment or transfer of plaintiff's said claim, or any part thereof, or interest therein, has been made, and that plaintiffs are justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that plaintiffs have at all times borne true allegiance to the Government of the United States, and neither of them have at any time or in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that plaintiffs, and each of them, believe the facts as stated in the foregoing Complaint to be true.

Wherefore, plaintiffs pray that it be adjudged and decreed that they were and are exempt from the payment of Federal income taxes on account of income arising from the sale of the timber referred to herein for the year 1943, and that they have and recover from defendants the sum of $362.20, with interest thereon at the legal rate from October 10, 1947; and that the court grant such other, further or additional relief in the premises as the nature of the case may afford and equity demand.

/s/ CHARLES T. PETERSON,

/s/ WENDELL W. DUNCAN,

Attorneys for Plaintiffs.

EXHIBIT "A"

4-182b-ty

The United States of America

To all to whom these presents shall come, greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior June 21, 1907, whereby it appears that Horton Capoeman; an Indian of the Quinaielt tribe or band, has been allotted the following described land:

The Lot four of Section twenty-five and the southwest quarter of the southwest quarter of Section twenty-four in Township twenty-two north of Range twelve west of the Willamette Meridian, Washington, containing ninety-three and twenty-five-hundredths acres;

Now know ye, That the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said Horton Capoeman, the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law: Provided, That the President of the United States may, in his discretion, extend said period.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the first day of October, in the year of our Lord one thousand nine hundred and seven and of

the Independence of the United States the one-hundred and thirty-second.

By the President:

/s/ THEODORE ROOSEVELT,

By /s/ F. M. McKEAN,
Secretary.

[Seal] /s/ H. A. SANFORD,
Recorder of the General
Land Office.

Recorded Miscellaneous vol. 663 Page 247.

EXHIBIT B

Form 1040—Treasury Dept.—Internal Revenue Service Page 1

UNITED STATES 1943
INDIVIDUAL INCOME AND VICTORY TAX RETURN

For Calendar Year 1943
or fiscal year beginning ....., 1943, and ending ....., 1944

Horton Capoeman and Emma
Tahola, Washington

Occupation: Restricted Indian.

Computation of Net Income
Income

1. Salary, Wages, and Compensation for Personal Services:
Employer's Name, U.S. Army.

	Column 1 Income Tax Net Income	Column 2 Victory Tax Net Income
City and State, Various	$ 600.00	Exempt
5. (a) Net gain (or loss) from sale or exchange of capital assets. (From Schedule B)	2,859.32	
9. Total income in items 1 to 9	$2,859.32	

to taxpayers during the year 1943; the balance of $6,880.78 is held in trust in an individual account of said taxpayer, subject to withdrawal by said taxpayer with the consent of the Indian Agency and Department of Interior Officials.

The timber was acquired without actual cost, pursuant to a treaty negotiated between the United States and the Quineault Indian Tribe in exchange for vast areas of land ceded to the government. The Fair Market Value as of March 31, 1913, was used as a basis, which value was determined and secured from Mr. Lester McKeever, veteran Forest Ranger, Taholah Indian Agency, Hoquiam, Washington. Costs of administration by the Indian Agency were deducted as an expense of sale.

HORTON CAPOEMAN.

EXHIBIT C

Form 843
Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

Claim

To be filed with the collector where assessment was made or tax paid

Collector's Stamp: (Date received) [Blank]

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ Refund of Tax Illegally Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of Washington,
County of Grays Harbor—ss.

Name of taxpayer or purchaser of stamps: Horton Capoeman and Emma.
Business address: Tahola, Wash.
Residence: Tahola, Wash.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Washington.
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1943 to Dec. 31, 1943.
3. Character of assessment or tax: Income Tax.
4. Amount of assessment, $298.11; dates of payment: Sept. 12, 1947.
5. Date stamps were purchased from the Government .....
6. Amount to be refunded $298.11
7. Amount to be abated (not applicable to income gift, or estate taxes) ..... $ .....

8. The time within which this claim may be legally filed expires, under section ..... of ..... (Revenue Act or Internal Revenue Code) on ....., 19...

The deponent verily believes that this claim should be allowed for the following reasons:

It is contended that payment or exaction of payment of Income Tax on income derived from the sale of timber upon the land of the taxpayer, a resident of the Quinault Tribal reservation, and within the boundaries of which is situated the timber in question is unlawful. For this and other reasons contained in the attached statement refund of the tax which has been paid is hereby prayed for.

(Attach letter-size sheets if space is not sufficient)

/s/ .....,

.....

Sworn to and subscribed before me this 8th day of January, 1948.

.....,

(Signature of officer administering oath)

That claimants are and at all times in this claim mentioned were full-blood Quinaielt Indians born on the Quinaielt Indian Reservation within the United States and are duly enrolled, allotted and recognized members of the Quinaielt Indian Tribe of the Quinaielt Indian Reservation in the State of Washington and have resided on said Reservation

continuously since their respective births, save and except an absence therefrom by Horton Capoeman to serve with the armed forces of the United States in World War II; that they affiliate with said Tribe of Indians and are under the jurisdiction, supervision and control of the United States acting by and through the Superintendent of the Taholah Indian Agency at Hoquiam, Grays Harbor County, Washington, and are and at all times mentioned in this claim were classified as non-competent wards of the Government of the United States;

That on July 1, 1855 and January 25, 1856, Articles of Agreement and Convention were made and concluded by and between the United States of America acting through its duly authorized representatives and the Quinaielt and other bands or tribes of Indians acting through their chiefs and delegates, whereby the members of said Indian Tribes ceded, relinquished and conveyed to the United States their respective rights, title and interest in and to certain lands and country then occupied by them described in said Articles of Agreement and Convention of July 1, 1855 (12 Stat. 971), which said Treaty is a public document embraced in an Act of Congress and is hereby referred to and made a part hereof by reference. That said Treaty was ratified by the United States on March 8, 1859 and duly proclaimed on April 15, 1859, by the terms of which said Treaty there was secured to members of the Quinaielt Tribe Band of Indians, their posterity and successors, a reservation of lands sufficient for their needs, which said Reservation

was later designated by the United States and thereafter surveyed and set apart for the exclusive use of the members of said Quinaielt Tribe of Indians, their posterity and successors in interest, and that said Indian Reservation so set aside has been the home and abiding place of the members of the Quinaielt Tribe of Indians, including claimants. That claimants are the posterity of and successors in interest of the members of said Quinaielt Tribe of Indians who participated in the making of said Treaty.

That in pursuance of said treaties and laws of Congress enacted in pursuance thereof, there was allotted to claimants the following described real property within Quinaielt Indian Reservation, Grays Harbor County, Washington, to wit:

Lot four of Section twenty-five and the southwest quarter of the southwest quarter of Section twenty-four in Township twenty-two north of Range twelve west of the Willamette Meridian, Washington, containing ninety-three and twenty-five-hundredths acres; containing ..... acres of land, and that a trust patent therefor was duly issued to claimant Horton Capoeman on the 1st day of October, 1907, a copy of which said trust patent is hereto attached marked Exhibit "A" and made a part of this claim by reference. That according to the terms of said treaties and laws of Congress enacted in pursuance thereof, the lands embraced within said description above set forth, together with the standing timber thereon, consisting of coniferous-bearing trees from one hundred to several hundred years of age, is, and at all times in

this claim mentioned, was trust property under the sole supervision and control of the United States, and neither said land nor the timber growing thereon, which was and is a part of said real estate is subject to voluntary alienation by claimants without the consent and approval first had of the United States. That during the year 1943 a sale of a portion of claimants' allotment, consisting of certain timber growing and standing thereon was conducted by the Department of the Interior of the United States, Bureau of Indian Affairs, acting through the local Indian Agency of the United States having jurisdiction of said Quinaielt Indian Reservation; that a contract of sale by said Agency was entered into providing for payment of timber as it was cut; that out of a total of $15,080.80 to be finally realized from the sale of said timber from said allotment but $8,418.28 was paid during said year, and the balance of said agreed purchase price was paid during subsequent years; that of said sum of $8,418.28 so paid on account of said sale of timber, $1,537.00 thereof was disbursed to claimants during the year 1943, and the balance of said sum, to wit, $6,878.00 was held in trust and maintained in an account to the credit of the United States, subject only to withdrawal by claimants by and with the consent of said United States Indian Agency and the Department of Interior officials of the United States. That claimants' only entire income during the calendar year 1943, other than certain monies paid to claimant Horton Capoeman as a member of the Armed Forces of the United States,

received in this office January 12, 1948. In your claim you indicate that income derived from the sale of timber upon your allotted land situated within the boundaries of the Quinailet Reservation is not taxable.

According to Tax Court Decision (Madeline E. Mounts Scott #8 TC 126 (No. 13)) income from the sale of timber from allotted land on an Indian Reservation is taxable. Therefore, your claim mentioned above is denied. If you do not concur with the Tax Court Decision, however, you may file a formal protest duly signed which we shall forward to the Commissioner of Internal Revenue for consideration.

Should further correspondence become necessary, kindly refer to the symbols and number appearing in the upper left-hand corner of this letter.

Very truly yours,

CLARK SQUIRE,
COLLECTOR,

By /s/ F. I. WOODWORTH,
Chief, Income Tax Division.

Duly verified.

[Endorsed]: Filed February 27, 1948.

[Title of District Court and Cause.]

ORDER DISMISSING UNITED STATES OF AMERICA

This matter having come on regularly for hearing before the above-entitled court; and it appearing that the plaintiff has elected to proceed against Clark Squire, Collector of Internal Revenue for the District of Washington; and it further appearing that the parties hereto have signed and filed a stipulation providing that the United States of America may be dismissed without prejudice and without costs, and the court being fully advised in the premises, now, therefore,

It Is Ordered, Adjudged and Decreed that the United States of America defendant in the above-entitled action, be and it hereby is dismissed without prejudice and without costs.

Done in open court this 10th day of August, 1949.

/s/ CHARLES H. LEAVY,
United States District Judge.

Approved as to Form:

/s/ GUY A. B. DOVELL,
Of Attorneys for Defendants.

Presented by:

/s/ W. W. DUNCAN,
Of Attorneys for Plaintiff.

[Endorsed]: Filed August 10, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Clark Squire, Collector of Internal Revenue for the Internal Revenue Collection District of Washington by his attorney, J. Charles Dennis, United States Attorney for the Western District of Washington, the defendant United States of America having heretofore been dismissed from this cause, and in answer to plaintiffs' complaint, states:

1. The averments of paragraph 1 are admitted.
2. The averments of paragraph 2 are admitted.
3. The averments of paragraph 3 are denied.
4. The averments of paragraph 4 are admitted.
5. The averments of paragraph 5 are admitted.
6. The averments of paragraph 6 are denied, except that it is admitted that under the terms of the Treaties with the Quinaielt Indians, and Laws of Congress enacted in pursuance thereof, the land embraced within the description set forth in Complaint, paragraph V, was trust property under the joint control of the United States and the plaintiffs, and that neither the land, nor the timber growing thereon, was subject to alienation by plaintiffs without the consent and approval of the United States.
7. The averments of paragraph 7 are denied, except that it is admitted that during the year 1943 certain standing timber on plaintiffs' allotment was cut and sold under a contract entered into by the Bureau of Indian Affairs of Department of the In-

terior of the United States, with the approval of the plaintiffs; that the contract of sale provided for payment of timber after it was cut and sold; that out of a total of $15,080.80 ultimately realized from the sale of cut timber from said allotted land, only $8,418.28 was cut, sold and paid for during 1943; that of said sum of $8,418.28, the amount of $1,537 was disbursed to plaintiffs during the year 1943, and the balance of said sum, to wit, $6,878.00, was held in trust by the United States and maintained in an account for the benefit of the plaintiffs, subject to withdrawal by the plaintiffs for their own use and benefit by, and with the consent of, certain officials of the Department of the Interior of the United States.

8. The averments of paragraph 8 are denied, except that it is admitted that plaintiffs' entire income during the calendar year 1943, other than certain moneys paid to plaintiff Horton Capoeman as a member of the armed forces of the United States, consisted of the proceeds from the sale of timber cut from his allotment.

9. The averments of paragraph 9 are denied.

10. The averments of paragraph 10 are denied.

11. The averments of paragraph 11 are denied.

12. The averments of paragraph 12 are admitted.

13. The averments of paragraph 13 are denied, except that it is admitted that the lands allotted to plaintiffs and described in paragraph V of the complaint were heavily timbered, and that said lands are generally unsuitable for agricultural purposes but are most adaptable for timber cultural purposes.

14. The averments of paragraph 14 are admitted, except that it is denied that any amount of money was wrongfully collected by the defendant from the plaintiffs.

15. The averments of paragraph 15 are denied, except that it is admitted that a claim for refund was filed with the defendant Squire on January 12, 1948, and that Complaint, Exhibit C, is a copy thereof.

16. The averments of paragraph 16 are denied, except that it is admitted that on January 21, 1948, the defendant Squire transmitted a letter to plaintiff Horton Capoeman, a copy of which is attached to the complaint as Exhibit D.

17. The averments of paragraph 17 are denied.

18. The averments of paragraph 18 are denied.

19. The averments of paragraph 19 are denied.

20. The averments of paragraph 20 are denied.

21. The averments of paragraph 21 are admitted, except that it is denied that plaintiffs are entitled to recover any amount herein.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ HARRY SAGER,
Asst. United States Attorney,

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue, Attorneys for Defendant.

[Endorsed]: Filed August 26, 1949.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel, that the following facts may be taken as true with the reservation that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated, and subject to the right of either party to object to any fact herein stipulated on the ground that it is irrelevant and immaterial.

I.

That Horton Capoeman and Emma Capoeman are, and during all of the times herein mentioned were, husband and wife, and are full-blooded Quinaielt Indians, born on the Quinaielt Indian Reservation within the United States, and at all times herein mentioned were, and are, duly enrolled and recognized members of the Quinaielt Indian Tribe, Quinaielt Indian Reservation, Washington, and are citizens of the United States and residents of the State of Washington.

II.

That plaintiffs, Horton Capoeman and Emma Capoeman, are and at all times herein mentioned were under the jurisdiction, supervision and control of the United States, acting by and through the Superintendent of the Taholah Indian Agency, and are, and at all times herein mentioned were, classified as non-competent Indians and wards of the government of the United States.

III.

That the defendant, Clark Squire, is, and at all times material was, Collector of Internal Revenue of the United States for the collection district of Washington, residing at Tacoma, Pierce County, Washington, within the above-entitled district.

IV.

That on July 1, 1855, and January 25, 1856, Articles of Agreement and Convention were made and concluded by and between the United States of America acting through its duly authorized representatives and the Quinaielt and other bands or tribes of Indians acting through their chiefs and delegates, whereby the members of said Indian Tribes ceded, relinquished and conveyed to the United States their respective right, title and interest in and to certain lands and country then occupied by them described in said Articles of Agreement and Convention of July 1, 1855 (12 Stat. 971). That said Treaty was was ratified by the United States on March 8, 1859, and duly proclaimed on April 15, 1859, by the terms of which said Treaty there was secured to members of the Quinaielt Tribe Band of Indians, their posterity and successors, a reservation of lands sufficient for their needs, which said reservation was later designated by the United States and thereafter surveyed and set apart for the exclusive use of the members of said Quinaielt Tribe of Indians, their posterity and successors in interest, and that said Indian Reservation so set aside has been the home and abiding place of the members of

the Quinaielt Tribe of Indians, including plaintiffs. That plaintiffs are the posterity of and successors in interest of the members of said Quinaielt Tribe of Indians who participated in the making of said treaty.

V.

That Horton Capoeman, one of the plaintiffs, was allotted the following described real property within the Quinaielt Indian Reservation, Grays Harbor, Washington:

> Lot four of Section twenty-five and the southwest quarter of the southwest quarter of section twenty-four in Township twenty-two north of range twelve west of the Willamette Meridian, Washington, containing ninety-three and twenty-five hundredths acres;

under authority of the Quinaielt Treaty of July 1, 1855 (12 Stat. 971), and the General Allotment Act of February 22, 1887 (24 Stat. 388), and Acts of Congress supplementary thereto or amendatory thereof, and that a trust patent therefor was duly issued to Horton Capoeman on October 1, 1907, copy of which is hereto attached, made a part hereof and marked Exhibit "A."

VI.

That fee title to the above-described land is held by the United States in trust for Horton Capoeman.

VII.

That the lands hereinabove described, together with the standing timber, consisting of coniferous-bearing trees, are, and at all times herein mentioned,

were trust property under the joint supervision and control of the United States and Horton Capoeman, and neither said land nor the timber growing thereon was, or is, subject to alienation by the plaintiff, Horton Capoeman, without the consent and approval first had of the United States.

VIII.

That during the year 1943 certain standing timber on plaintiffs' allotment was cut and sold under a contract entered into by the Bureau of Indian Affairs of Department of the Interior of the United States, with the approval of the plaintiffs; that the contract of sale provided for payment of timber after it was cut and sold; that out of a total of $15,080.80 ultimately realized from the sale of cut timber from said allotted land, only $8,418.28 was cut, sold and paid for during 1943; that of said sum of $8,418.28, the amount of $1,537 was disbursed to plaintiffs during the year 1943 and the balance of said sum, to wit, $6,878.00 (an unaccounted for expenditure of $3.28), was placed in trust by the United States and maintained in an account for the benefit of the plaintiffs, subject to withdrawal solely by or for the plaintiffs for their use and benefit by and with the consent of the appropriate officials of the Department of the Interior of the United States.

IX.

That the plaintiffs, Horton and Emma Capoeman, his wife, filed a joint income tax return for the year 1943, a copy of which said income tax return,

marked Exhibit "B" and made a part hereof by reference; in pursuance of which said income tax return plaintiffs, on October 10, 1947, paid to the defendant, Clark Squire, as Collector of Internal Revenue for the District of Washington, the sum of $298.11 and $64.09 accrued interest, as set forth in said return, Exhibit "B."

X.

That subsequent to the payment by plaintiffs of said income tax, plaintiffs, on January 12, 1948, filed a claim for refund with the said Clark Squire as such Collector of Internal Revenue, a copy of which said claim for refund of said payment is attached hereto marked Exhibit "C" and made a part of this complaint by reference.

XI.

That on January 21, 1948, defendant denied said claim for refund by denial in writing, copy of which said denial is marked Exhibit "D" and made a part hereof by reference.

Signed and dated this 9th day of November, 1951.

/s/ KENNETH R. L. SIMMONS,
Attorney for Plaintiffs.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue, Attorneys for Defendants.

[Endorsed]: Filed November 14, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now, on this .... day of ....., 1952, the Court, after considering the stipulation of facts, admissions of the parties, and the briefs, makes the following findings of fact:

I.

The Court has jurisdiction of the parties and of the subject matter.

II.

The defendant, Clark Squire, at all pertinent times herein was the duly commissioned, qualified and acting Collector of Internal Revenue of the United States for the District of Washington.

III.

That Horton Capoeman and Emma Capoeman, his wife, plaintiffs herein are citizens of the United States and non-competent Indian wards of the United States, under the supervision and control of the Taholah Indian Agency. That they are full-blood Quinaielt Indians, born and residing upon the Quinaielt Indian Reservation in the State of Washington.

IV.

That under the provisions of the Quinaielt Treaty with the United States, dated July 1, 1855, and January 25, 1856 (12 Stat. 971), Quinaielt Indian tribal lands were transferred to the United States.

but there was reserved therefrom and set apart for the exclusive use of the members of the Quinaielt Tribe an area designated in accordance with the terms of the treaty. That on October 1, 1907, pursuant to the terms of the treaty and the General Allotment Act of February 8, 1887 (24 Stat. 388), a trust patent was issued to Horton Capoeman, one of the plaintiffs herein, for approximately ninety-three acres of tribal land within the Quinaielt Reservation, described as follows:

> Lot Four Section Twenty-five and the southwest quarter of the southwest quarter of Section Twenty-four in Township Twenty-two north of Range Twelve west of the Willamette Meridian, Washington, containing ninety-three and twenty-five hundredths acres.

That the fee title to this land was and still is held by the United States in trust for Horton Capoeman and said land was not and still is not subject to alienation or encumbrance by the plaintiffs, except with the consent and approval of the proper agents of the United States, which has not yet been given to such alienation.

That during the year 1943, pursuant to a contract of sale entered into by the Bureau of Indian Affairs of the United States Department of the Interior providing for the cutting and sale of timber from plaintiffs' said lands, $8,418.28 worth of timber was cut, sold and paid for. Of the $8,418.28 received, $1,537.00 was distributed to plaintiffs and the balance of $6,878.00 (with $3.28 unaccounted for) was

placed in trust by the United States and maintained, subject to withdrawal solely by or for their use and benefit, in an account for the plaintiffs.

VI.

That plaintiffs filed a joint income tax return for the calendar year 1943, reporting long-term capital gain from the sale of the timber in that year. That the return was filed on October 10, 1947, and on that date plaintiffs paid the taxes shown due.

VII.

That on January 2, 1948, plaintiffs filed a claim for refund of the taxes paid and contended in their return that their income derived from the sale of timber from the allotted land was not subject to federal income taxation because such taxation would be in violation of the provisions of the Quinaielt treaty and of the trust patent.

VIII.

That the claim for refund was denied by the Bureau of Internal Revenue on January 21, 1948, and this action was instituted on March 3, 1948.

IX.

That none of the income involved was paid directly to these plaintiffs but all was paid into the Taholah Indian Agency at Taholah, Washington, and each disbursement therefrom was made under the supervision and control of the Department of the Interior. All such restricted funds are held by the United States Government for the sole use

and benefit of the individual Indian owner and all receipts or expenditures for each Indian are credited or charged to his individual account.

X.

That all income involved in this controversy is derived directly from the land which was allotted under the provisions of the Quinaielt Treaty of July 1, 1855, and the General Allotment Act of February 8, 1887.

Conclusions of Law

I.

That this Court has jurisdiction of this cause as it is one of the classes of cases provided for in 28 U.S.C.A. Secs. 1340-1353 (26 U.S.C.A. Sec. 3772 having been complied with).

II.

That the moneys derived from the sale of the timber as income received by the United States is money held in trust by the United States for these Indian wards and is part and parcel of the corpus of a trust-estate which the government has held since the Quinaielt treaty of 1855.

III.

That prior to the Quinaielt treaty of 1855 the Quinaielt Indians had rights of occupancy in a vast territory which was ceded to the United States in return for protection and tutelage, with the express understanding that title would be reserved to a tract

of land within the ceded area for the use and benefit of the Quinaielt Indians—legal title to which would be held by the United States as trustee for the Quinaielts.

IV.

That the General Allotment Act continued the relationship of guardian and ward and provided for individual allotments to members of the Quinaielt Tribe to be held in trust by the United States, which trust period has been indefinitely extended by Acts of Congress and Executive Orders of the President of the United States.

V.

That, as an obligation of the trustee, the United States of America the United States has no power to levy a duty or impost or charge upon the lands over which it has plenary power by virtue of ownership and sovereignty. That the State of Washington likewise can levy no taxes on the whole or any part or parcel thereof.

VI.

That only after the issuance of patent in fee by the United States to said lands, which must be authorized by the Indian in order to burden him with the weight of the obligation, the national and state governments are empowered to tax this land and its increments as the real property of any other citizen.

VII.

That the lands herein involved cannot be treated as "capital" or as a "capital asset" until the land

is thus conveyed, for by doing otherwise the General Allotment Act of February 8, 1887, would be violated by placing a "charge of incumbrance" on this land.

VIII.

That the State of Washington likewise cannot collect back taxes upon land before the date of conveyance in fee to the Indians.

IX.

That the federal government has no right upon a sale by an Indian, immediately after a patent to him in fee, to tax the difference in value between the date of the treaty, or even March 1, 1913, and the date of sale as a capital asset.

X.

That the sale of timber which is involved in this case is the sale of part of the realty, as timber, until severed, is a part of the land and the United States cannot tax a part or the whole of said lands for the reason that it would be in violation of its trust and the guarantee stated in the General Allotment Act of February 8, 1887.

XI.

That this tax exemption once granted by Congress is a vested property right which cannot constitutionally be impaired by subsequent legislation.

XII.

That the tax was erroneously, wrongfully and illegally collected and received by the defendant.

XIII.

That plaintiffs are entitled to recover from the defendant the sum of $362.20 with interest thereon at 6% from October 10, 1947, together with the costs of this action.

/s/ JAMES ALGER FEE,
United States District Judge.

Receipt of copy acknowledged.
Lodged September 16, 1952.
[Endorsed]: Filed October 13, 1952.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1101-Civil

HORTON CAPOEMAN and EMMA CAPOEMAN, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Defendants.

JUDGMENT

This cause came on for decision before the court sitting without a jury on the issues joined by the pleadings. A stipulation was executed between the parties on August 10, 1949, whereby the plaintiffs elected to proceed against Clark Squire, Collector of Internal Revenue for the District of Washington,

and further agreed that the defendant, the United States Attorney would be dismissed as a party defendant in said action without prejudice and without cost. A stipulation was consummated between the parties to the action, through their attorneys of record, as to the facts of the case with the reservation in either party to introduce other and further evidence not inconsistent with the facts as stipulated. No further evidence was introduced by either of the parties and following the submission of briefs by the respective parties the Court received the case for decision.

The Court being fully advised in the premises and having adopted herein its findings of fact and conclusions of law and having directed that judgment be entered in accordance therewith.

Now, therefore, by reason of the law and the findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiffs, Horton Capoeman and Emma Capoeman, his wife, the plaintiffs herein, recover from the defendant, Clark Squire, Collector of Internal Revenue for the District of Washington the sum of $362.20 with interest thereon at the rate of 6% from October 10, 1947, until paid and their costs of this action.

/s/ JAMES ALGER FEE,
United States District Judge.

Receipt of copy acknowledged.
Lodged September 16 1952.
[Endorsed]: Filed October 13, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Clark Squire, Collector of Internal Revenue for the District of Washington, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on October 13, 1952, in favor of the plaintiffs in said action and against the defendant, Clark Squire, Collector of Internal Revenue for the District of Washington, and from the whole thereof.

This appeal is taken on behalf of said defendant alone, the United States of America having prior

This appeal is taken on behalf of said defendant

Dated October 29, 1952.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ GUY A. B. DOVELL,
Asst. United States Attorney,

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue, Attorneys for Defendant Clark Squire, Collector of Internal Revenue for the District of Washington.

Address: 324 Federal Building, Tacoma 2, Washington.

Affidavit of mail attached.

[Endorsed]: Filed October 29, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

I, James Alger Fee, one of the United States District Judges for the District of Oregon, sitting as United States District Judge for the Western District of Washington, Southern Division, in the above case, and in accordance with Title 28, U. S. Code, Sec. 2006, do hereby certify that the acts done by the defendant Clark Squire as Collector of Internal Revenue for the District of Washington in exacting and collecting the taxes for which judgment was entered in the above entitled action on October 13, 1952, in the sum of $362.20, with interest at the rate of 6% per annum from the 10th day of October, 1947, until paid, as set forth in said judgment, were done under the direction of the Commissioner of Internal Revenue in his then official capacity as such Collector of Internal Revenue, and that the said defendant had probable cause for his acts notwithstanding the fact that said tax and interest was erroneously collected and judgment has been rendered for refund thereon in this case.

Dated this ... day of ....., 1952.

/s/ JAMES ALGER FEE,
United States District Judge.

Presented by:

/s/ THOMAS R. WINTER,

11-14-52. Issued cert. copy to U. S. Atty.

[Endorsed]: Filed November 14, 1952.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Comes now Clark Squire, the defendant-appellant in the above-entitled cause, and states that the points upon which he intends to rely in his appeal are that the income derived from the sale of cut timber from allotted lands in the hands of full-blood restricted Quinaielt Indians is subject to federal income taxes, no express tax exemption having been granted to such Indians either by agreements or legislation, and that such cutting and sale of timber from the allotted lands does not violate the trust under which the lands are held, and that the District Court erred in holding otherwise.

/s/ J. CHARLES DENNIS,
United States Attorney, Attorney for Defendant-Appellant.

[Endorsed]: Filed November 20, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above entitled Court, do hereby certify that pursuant to the pro-

visions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith all of the original papers and pleadings filed in the above entitled cause, and the said papers and pleadings herewith transmitted constitute the Record on Appeal from that certain Judgment of the above-entitled Court, filed and entered on October 13, 1952, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, California, and are identified as follows:

1. Complaint (filed Feb. 27, 1948)
2. Praecipe for Summons. (filed Feb. 27, 1948)
3. Marshal's Return of Service on Summons (filed Mar. 5, 1948)
4. Stipulation and Order Extending Time to Answer (filed May 6, 1948)
5. Motion to Require Election Between Parties Defendant (filed May 27, 1948)
6. Stipulation re Dismissal of United States (filed Aug. 10, 1948)
7. Order Dismissing United States (filed Aug. 10, 1948)
8. Answer (filed Aug. 26, 1949)
9. Substitution of Attorney (filed June 29, 1951)
10. Praecipe for Appearance of Kenneth R. L. Simmons as Attorney for Plaintiffs (filed July 5, 1951)
11. Stipulation of Facts (filed Nov. 14, 1951)
12. Opinion (filed Feb. 3, 1952)

13. Findings of Fact and Conclusions of Law (filed and entered Oct. 13, 1952).

14. Judgment (filed and entered Oct. 13, 1952)

15. Notice (defendant) of Appeal (filed October 29, 1952)

16. Certificate of Probable Cause (filed Nov. 14, 1952)

17. Designation (Defendant) of Record on Appeal (filed Nov. 20, 1952)

18. Statement of Points to be Relied Upon on Appeal (filed Nov. 20, 1952)

19. Affidavit of Mailing

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the defendant-appellant for preparation of the said Record on Appeal, to wit: notice of Appeal, $5.00, and that the said amount has not been paid to me for the reason that the appeal is being prosecuted by the United States.

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court, at Tacoma, Washington, this 1st day of December, 1952.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 13640. United States Court of Appeals for the Ninth Circuit. Clark Squire, Collector of Internal Revenue for the District of Washington, Appellant vs. Horton Capoeman and Emma Capoeman, his wife, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: December 4, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13640

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellant,

vs.

HORTON CAPOEMAN and EMMA CAPOEMAN, His Wife,

Appellees.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD FOR PRINTING

Comes now appellant and, pursuant to Sub-division 6, Rule 19 of the Rules of the United States

Court of Appeals for the Ninth Circuit, herewith adopts the Statement of Points filed by appellant in the District Court upon which appellant intends to rely on appeal.

With the foregoing statement, the appellant designates as necessary for the consideration of this appeal the following portions of the original papers of record in this cause heretofore transmitted by the Clerk of the District Court to the United States Court of Appeals for the Ninth Circuit, material in the consideration of this case, to be printed for purposes of this appeal, to wit:

1. Complaint.
2. Order dismissing United States of America, dated August 10, 1949.
3. Answer of defendant.
4. Stipulation of Facts.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Notice of Appeal.
8. Certificate of Probable Cause.
9. Designation of Record on Appeal.
10. Statement of Points to be Relied upon on Appeal.
11. Appellant's Statement of Points and Designation of Record for Printing, with Proof of Service.

Dated this 9th day of December, 1952.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States Attorney.

/s/ THOMAS R. WINTER,
Civil Advisory Counsel, Seattle District, Bureau of Internal Revenue.

Affidavit of Mailing attached.

[Endorsed]: Filed December 11, 1952.

[55] In United States District Court for the Western District of Washington Southern Division

No. 1101

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE, PLAINTIFFS, VS. UNITED STATES OF AMERICA AND CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, DEFENDANTS

Opinion

August 27, 1952

JAMES ALGER FEE, *District Judge:*

Horton Capoeman and Emma Capoeman, his wife, both citizens of the United States, hereinafter referred to as "plaintiffs," are noncompetent Indian wards of the United States under the supervision and control of the Taholah Indian Agency. They are full-blood Quinaielt Indians, born and residing on the Quinaielt Reservation in the State of Washington.

Under the provisions of the Quinaielt Treaty with the United States, dated July 1, 1855, and January 25, 1856 (12 Stat. 971), Quinaielt Indian tribal lands were transferred to the United States, but there was reserved therefrom and set apart for the ~~exclusive~~ use of the members of the Quinaielt tribe an area designated in accordance with the terms of the treaty. On October 1, 1907, pursuant to the terms of the treaty and the General Allotment Act of February 8, 1887 (24 Stat. 388), a trust patent was issued to Horton Capoeman for approximately ninety-three acres of tribal land within the Quinaielt Reservation. The fee title to this land was and still is held by the United States in trust for Horton Capoeman, and said land was not and still is not subject to alienation nor encumbrance by plaintiffs except with the consent and approval of the proper agents of the United States.

56 During the year 1943, pursuant to a contract of sale entered into by the Bureau of Indian Affairs of the United States Department of Interior providing for the cutting and sale of timber from plaintiffs' allotment, $8,418.28 worth of timber was cut, sold and paid for. Of the $8,418.28 received, $1,537.00 was distributed to plaintiffs, and the balance of $6,878.00 (with $3.28 unaccounted for) was placed in trust by the United States and maintained, subject to withdrawal solely by or for their use and benefit, in an account for the plaintiffs.

Plaintiffs filed a joint income tax return for the calendar year 1943, reporting long-term capital gain from the sale of the timber

in that year. The return was filed on October 10, 1947, and on that date plaintiffs paid the taxes shown due.

On January 2, 1948, plaintiffs filed a claim for refund of the taxes paid, and contended that their income derived from the sale of timber from the allotted land was not subject to federal income taxation because such taxation would be in violation of the provisions of the Quinaielt Treaty and of the trust patent. The claim for refund was denied by the Bureau of Internal Revenue on January 21, 1948, and this action was instituted on March 3, 1948.

The refund must be allowed.

The United States now has a sum of money in trust for these Indian wards. It is demonstrable that this amount is part and parcel of the corpus of a trust estate which the government has held ever since the treaties of 1855 and 1856.[1] Before that
57 date, the Indians had rights of occupancy in a vast territory. These were ceded to the United States in return for protection and tutelage.[2] But there was expressly reserved the title to a tract of land.[3] The United States held the legal title thereof as trustee. When the allotment acts[4] were given effect, there was no change in this situation. The Indians simply relinquished their respective claims to a large area of communal lands, and each respectively accepted in lieu thereof equitable title to a definite parcel of land allotted in severalty.[5] At the end of the trust period, a conveyance was to be made to the Indian or his heirs of such parcel, in fee "discharged of said trust and free of all charge or incumbrance whatsoever."[6] This is a simple restatement of the obligation of the trustee. As a result, the United States has no power to levy a duty or impost or charge upon the lands over which it has plenary power by virtue of ownership and sovereignty. The State of Washington can levy no tax on the whole or any part or parcel thereof.[7] After the conveyance, which must be authorized by the Indian in order to burden him with the weight of obligation, the national and state governments are empowered to tax this land and its increments as the real property of any other citizen.[8] It follows that, until the land is

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[1] 12 Stat. 971.
[2] Article I of the Treaty, 12 Stat. 971.
[3] Article II of the Treaty, 12 Stat. 971.
[4] 24 Stat. 388, as amended 25 U. S. C. A. 331-57.
[5] 25 U. S. C. A. Sec. 331.
[6] 25 U. S. C. A. Sec. 348.
[7] The tax exemption "runs equally" against state and federal governments. See Landman vs. United States, 71 F. Supp. 640, 645; Oklahoma Tax Commission vs. United States, 319 U. S. 598.
[8] 25 U. S. C. A. Sec. 349.

thus conveyed, it cannot be treated as "capital" or a "capital asset." For by such classification the United States would
58 be violating not only a moral right of the Indian, but would be violating the statute by placing a "charge or incumbrance" on the land. The state cannot collect back taxes upon land before the date of conveyance in fee to the Indians. The federal government has no right upon a sale by the Indian immediately after a patent to him in fee, to tax the difference in value between the date of the treaty, or even March 1, 1913, and the date of sale as a capital asset. By that process it could destroy the value of the trust property. Likewise, there could be no tax upon a sale by the United States of ten acres out of an hundred-acre allotment with the consent of the allottee before the end of the trust period. The reason is that the government had the real property in trust before the sale of part thereof, and the price received is only a substitute charge. But here the sale was of part of the realty. Timber, until severed, is part of the land.[9] No distinction can be drawn between the operation and the sale of a parcel out of a larger area.[10]

During the long history of the Chancelors and in the equity courts, cutting of timber by one not the owner of the fee constituted waste, and the proceeds of timber cut by a trustee was a part of the trust estate. If the timber had remained standing upon the land until patent issued in fee, neither state nor national government could have taxed it because it was part of the trust property. Nor on sale of the severed timber after patent could the increment in value be based upon a date prior to the transfer of the land to the Indian.
59 This holding is not inconsistent with decisions that the proceeds of fructus industriales such as grasses cut from the land or the fruits of fisheries appurtenant can be taxed. There no portion of the corpus of the trust is taxed, but only the profit therefrom. It is more doubtful that the pro rata share of the individual Indian in the distribution of the yield of tribal communal lands can be taxed, but at least a basis for rationalization exists. In the instant situation, the trust is violated by an uncompensated diminution of the corpus.

For the reasons indicated, it is held that the refund is allowed.[11]

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[9] Northern Pacific Railroad vs. Paine, 119 U. S. 561, 564.

[10] This same reasoning was used in connection with oil and gas royalties by the Supreme Court in Parker vs. Riley, 250 U. S. 66, 70.

[11] Under the above analysis, the following cases are distinguishable and have no application to the instant situation: Jones vs. Pagnah, 10 Cir., 186 F. 2d 445; Choteau vs. Burnet, 283 U. S. 691; Superintendent of Five Civilized Tribes vs. Commissioner, 295 U. S. 418; Cherokee Tobacco, 11 Wall. 616; Strom vs. Commissioner of Internal Revenue, 6 T. C. 521.

[File endorsement omitted.]

60 [Clerk's Certificate to foregoing paper omitted in printing.]

62 Omit.

63 Omit.

64 In United States Court of Appeals for the Ninth Circuit

Minute entry of argument and submission

February 24, 1955

[Omitted in printing.]

65 In United States Court of Appeals for the Ninth Circuit

Order directing filing of opinion and filing and recording of judgment

March 11, 1955

Ordered that the typewritten per curiam opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

66 In United States Court of Appeals for the Ninth Circuit

No. 13,640

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, APPELLANT

vs.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE, APPELLEES

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Before: HEALY, BONE, and CHAMBERS, *Circuit Judges.*

Opinion per curiam

March 11, 1955

This case has to do with the taxability as income of the proceeds of a sale of timber on trust allotted land of a tribal Indian.

Under the provisions of a treaty with the Quinaielt Indian Tribe, 12 Stat. 971, tribal lands in what is now the State of Washington were transferred to the United States. By the terms of the treaty an area was reserved therefrom and set apart for the exclusive use of the members of the tribe. Pursuant to the terms of the treaty and of the General Allotment Act of 1887, 24 Stat. 388, a trust patent was issued to appellee Horton Capoeman for some ninety-three acres of tribal land within the Quinaielt Reservation. The fee title to this land was and still is in the United States in trust for Capoeman (an unemancipated member of the tribe) to be conveyed to him or his heirs at the end of the trust period in fee "discharged of said trust and free of all charge or incumbrance whatsoever." 25 USCA § 348.

67 In 1943, pursuant to a contract of sale entered into by the Bureau of Indian Affairs, with Capoeman's consent, standing timber on the latter's allotment was sold, cut and paid for. The timber, it is agreed, constituted the chief value of the land. A minor part of the sales price was distributed to Capoeman, the bulk of it being retained in trust for him by the United States. Capoeman and his wife, Emma, filed for that year a joint income tax return reporting long-term capital gain from the sale. Subsequently they brought this suit for refund of the tax paid, and the district court granted judgment in their favor.

The opinion of the trial judge is reported in 110 F. Supp. 924. Inasmuch as we agree with the judges' holding and in the main with the reasons given for it, no useful purpose would be served by our again plowing that field. Enough to say that in our view this attempt to tax evidences, at the least, a sorry breach of faith with these Indians. We may add that while the court below appeared to regard as distinguishable the decision of the Tenth Circuit in the cognate case of Jones v. Tannah, 186 F. 2d 445, we see no ground upon which the holding can be distinguished. Rather, we agree with the dissenting opinion of Chief Judge Phillips.

Affirmed.

[File endorsement omitted.]

68 In United States Court of Appeals for the Ninth Circuit

No. 13,640.

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, APPELLANT,

vs.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE, APPELLEES.

Judgment

Filed and entered March 11, 1955.

Appeal from the United States District Court for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

69 [Clerk's Certificate to foregoing transcript omitted in printing.]

70 Supreme Court of the United States

No. 134, October Term, 1955

[Title omitted.]

Order allowing certiorari

Filed October 10, 1955.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.